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Supreme Court, U.S.
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No. 10-212

IN THE

Supreme Court of the United States

MARIA HENRIETTA WILLIAMS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 111 of Title 18 of the United States Code imposes criminal liability upon anyone who "forcibly assaults, resists, opposes, impedes, intimidates, or interferes with" a federal officer in the performance of his or her duties under three sets of conditions, with increasingly severe penalties for each: (1) "where the acts . . . constitute only simple assault;" (2) "where such acts involve physical contact with the victim of that assault or the intent to commit another felony;" and (3) where, "in the commission of any [such] acts," the person "uses a deadly or dangerous weapon . . . or inflicts bodily injury . . . ." The question presented by this petition is:

Whether the Fifth Circuit erred in holding—in acknowledged conflict with the Ninth Circuit, and in conflict with decisions of other federal courts of appeals—that a defendant may be convicted of "simple assault" under § 111(a) even when the government has neither pleaded nor proved that the defendant engaged in assaultive conduct?

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OPINIONS BELOW

The Fifth Circuit's decision is reported at 602 F.3d 313 and reprinted in the Appendix ("App.") at App. 1–17a. The district court's oral rulings denying Mrs. Williams's motions for acquittal at the close of the government's case and at the close of evidence are reprinted at App. 19–21a.

JURISDICTION

The Fifth Circuit issued its decision on March 23, 2010, App. 1a, and denied a timely petition for rehearing en banc on May 14, 2010, App. 23–24a. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 111 of Title 28 of the U.S. Code provides in pertinent part:

> **§ 111. Assaulting, resisting, or impeding certain officers or employees**
>
> **(a) In general.** –Whoever–
>
> (1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of official duties; or
>
> (2) forcibly assaults or intimidates any person who formerly served as a person designated in section 1114 on account of the performance of official duties during such person's term of service,

shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both, and where such acts involve physical contact with the victim of that assault or the intent to commit another felony, be fined under this title or imprisoned not more than 8 years, or both.

(b) Enhanced penalty. –Whoever, in the commission of any acts described in subsection (a), uses a deadly or dangerous weapon (including a weapon intended to cause death or danger but that fails to do so by reason of a defective component) or inflicts bodily injury, shall be fined under this title or imprisoned not more than 20 years, or both.

STATEMENT

This petition raises the straightforward question of whether a defendant may be convicted of "simple assault" under 18 U.S.C. § 111(a) in the absence of proof that she committed an assault according to the common-law definition of the term.

Section 111 imposes criminal liability upon anyone who "forcibly assaults, resists, opposes, impedes, intimidates, or interferes with" federal officers in the performance of their duties under three sets of conditions, with an increasingly severe range of punishments corresponding to each. First, "acts in violation of this section constitut[ing] only simple assault" are punishable by imprisonment of less than a year. Second, "such acts involv[ing] physical contact with the victim of that assault or the intent to commit another felony" are punishable by imprisonment up to 8 years. Finally, "commission of any such acts . . . us[ing] a deadly or dangerous weapon or inflict[ing] bodily injury" carries the possibility of up to 20 years' imprisonment.

For many years, the courts of appeals held that the phrase "simple assault" in § 111(a) carries its common-law meaning—namely, attempted or threatened battery. Based on this reasoning, the Ninth Circuit held in 2008 that the prosecution of misdemeanor simple assault under § 111(a) requires the government to plead and prove all of the elements of common-law assault, including assaultive intent.

In this case, however, the Fifth Circuit affirmed the conviction of Maria Henrietta Williams on two counts of simple assault even though the government did not (and could not) prove that Mrs. Williams

intended to strike the federal officers who arrested her. Following the reasoning of a 2009 decision of the Sixth Circuit, the court held that "simple assault" should actually be interpreted as a statutory term of art, so that the relevant inquiry is whether a defendant "forcibly" engaged in the types of conduct listed in § 111(a), not whether an assault occurred. In ruling that a misdemeanor conviction under § 111(a) does not require underlying assaultive conduct, the Fifth Circuit acknowledged that its reasoning conflicted with that of the Ninth Circuit. Moreover, the Fifth Circuit's decision conflicts with the majority view among federal circuits holding that the reference to "simple assault" in § 111(a) must carry the common-law meaning of those words.

The Fifth Circuit's decision conflicts with that of other courts of appeals and, as detailed below, contradicts the plain meaning of the statutory text. As a result, Mrs. Williams faces imprisonment for having committed a "simple assault" against federal officers despite never having committed any underlying assaultive conduct. The petitioner therefore respectfully submits that the Court should grant the writ of certiorari to resolve the conflict among the federal courts of appeals concerning the proper interpretation of 18 U.S.C. § 111(a) and to vacate Mrs. Williams's conviction.

I. Factual Background

Maria Henrietta Williams is a wife and mother who resided with her husband—a U.S. Army Specialist presently serving in Iraq—and their five year-old son in military housing near Fort Bliss in El Paso, Texas. On May 31, 2008, three military police officers responded to a complaint made against Mrs.

Williams by one of her neighbors relating to an argument between the two. App., *infra*, 2a. When the three officers—Private Brianna Harris, Private First Class Andrew Putman, and Sergeant Michael Eichmann—arrived at Mrs. Williams's home, they found her sitting outside under the carport with her husband and child. *Id.*

Sgt. Eichmann asked Mrs. Williams whether someone could watch her child while she accompanied the police to the station for questioning. *Id.* While Sgt. Eichmann went inside the house with Spc. Williams to notify his chain of command, Pvt. Harris and Pfc. Putman remained outside with Mrs. Williams. *Id.* Upset, Mrs. Williams told the police that she would not be arrested and would not go with them to the station. *Id.* Mrs. Williams tried to walk past both officers. When they stood in her way, she turned to go through a side door in the carport area, only to be blocked by Sgt. Eichmann, who had returned from inside the house. Sgt. Eichmann then ordered the other police to detain Mrs. Williams. *Id.* at 3a.

Mrs. Williams informed the police that that she should not be handcuffed because of medical issues, including past wrist surgery and ongoing fibromyalgia—a condition that causes Mrs. Williams extreme pain when touched and for which she had only recently been diagnosed after suffering years of chronic pain. *Id.* at 2a. The police nevertheless attempted to detain and handcuff Mrs. Williams.

When Pvt. Harris first tried to make an arrest, Mrs. Williams swung her arms away to avoid the handcuffs. *Id.* Sgt. Eichmann then ordered the other police to detain Mrs. Williams by force.

Pvt. Harris grabbed Mrs. Williams by the wrist and shoulder and pushed her onto the backyard fence. *Id.* Mrs. Williams and Pvt. Harris fell through the fence, and in the process, the back of Mrs. Williams's hand caught Pvt. Harris in the nose. *Id.* Pfc. Putnam then forced Mrs. Williams to the ground but, while he was forcing her down, Mrs. Williams's left elbow hit him in the face. *Id.* Pfc. Putnam finally managed to restrain and handcuff Mrs. Williams, who was then taken to the station and transferred to FBI custody. *Id.* Although she had moved her arms to avoid being handcuffed by the police, Mrs. Williams did not intend to strike them. *See id.*

II. The District Court Proceedings

A grand jury indicted Mrs. Williams on two counts of violating 18 U.S.C. § 111(a)(1). The indictment did not allege any physical contact between Mrs. Williams and the police who arrested her. App. at 3a. In other words, she was charged with a "simple assault" misdemeanor under § 111(a).

At trial, the defense showed that Mrs. Williams did not intend to hit or injure any of the officers and that the contact was an accidental result of her efforts to avoid handcuffs. *Id.* Pfc. Putman agreed, testifying that Mrs. Williams did not hit either officer intentionally, but was only trying to avoid being handcuffed. *Id.* As Sgt. Eichmann explained, "[i]t wasn't like she was trying to fight with us, but we weren't going to take her." *Id.*

When the government rested, and again at the close of the evidence, Mrs. Williams moved for a judgment of acquittal, arguing that the prosecution failed to meet its burden of proof. The court denied both motions, and the jury found Mrs. Williams

guilty on both counts. *Id.* The court sentenced Mrs. Williams to 21 months of imprisonment on each count, with the sentences to run concurrently. *Id.* at 4a.

III. Decision of the Fifth Circuit

Mrs. Williams appealed both her conviction and sentence. Citing Fifth Circuit cases holding that "simple assault . . . embrace[s] the common law meaning of the term," *see United States v. Ramirez*, 233 F.3d 318, 321 (5th Cir. 2000), *overruled on other grounds by United States v. Cotton*, 535 U.S. 625, 629-31 (2002), Mrs. Williams argued that a conviction for simple assault under § 111(a) requires the government to plead and prove some form of assaultive conduct—which the government failed to do—and that mere "forcible resistance" was not enough to satisfy the elements of § 111(a).

The Fifth Circuit rejected Mrs. Williams's argument. The court acknowledged that it previously had "held that simple assault is a misdemeanor offense under § 111(a) and defined simple assault as an attempted or threatened battery." App. at 7a (citing *United States v. Hazlewood*, 526 F.3d 862, 865 (5th Cir. 2008); *Ramirez*, 233 F.3d at 321-22); *United States v. Vallery*, 437 F.3d 626, 631 (7th Cir. 2006)). Notwithstanding these earlier decisions, the court stated that it had never resolved whether a conviction under § 111(a)(1) necessarily requires, "at a minimum, underlying assaultive conduct." App. at 7–8a.

The Fifth Circuit recognized that "[s]everal circuits have split on this question." *Id.* at 8a. On the one hand, the Ninth Circuit's decision in *United*

States v. Chapman held that a "simple assault" misdemeanor necessarily included assaultive conduct as a required element. *Id.* at 8–9a (citing *United States v. Chapman*, 528 F.3d 1215, 1221 (9th Cir. 2008)). On the other, the Sixth Circuit held that the phrase "simple assault" as it appears in § 111(a) is merely a "term of art," which must be read to include "the forcible performance of any of the six proscribed actions in § 111(a) *without* the intent to cause physical contact or to commit a serious felony . . . ." *Id.* at 10a (quoting *United States v. Gagnon*, 553 F.3d 1021, 1027 (6th Cir. 2009) (emphasis in original)).

The Fifth Circuit decided to follow the reasoning of the Sixth Circuit in *Gagnon*, holding that "a misdemeanor conviction under § 111(a)(1) does not require underlying assaultive conduct." App. 11–12a. Having adopted that rule, the court found that there was ample evidence that Mrs. Williams "forcibly resisted" the officers, even if she had not assaulted them. *Id.* at 12a. While the Fifth Circuit affirmed Mrs. Williams conviction, it vacated her sentence and remanded for resentencing. *Id.* at 16a. The court held that the district court erred in sentencing Mrs. Williams to 21 months of imprisonment because her misdemeanor "simple assault" conviction could carry a maximum penalty of only one year. *Id.* at 14a.

This petition follows.

REASONS FOR GRANTING THE WRIT

I. The Courts Of Appeals Are Divided As To Whether A Defendant May Be Convicted Of "Simple Assault" Under § 111(a) When The Government Has Neither Pleaded Nor Proved That An Assault Had Occurred.

As the Fifth Circuit acknowledged in affirming Mrs. Williams's conviction, "[s]everal circuits have split on th[e] question" presented by this case. App. 8a. Along with the Sixth Circuit, the Fifth Circuit now holds that "a misdemeanor conviction under § 111(a)(1) does not require underlying assaultive conduct." *Id.* at 12a; *see also Gagnon*, 553 F.3d at 1026-28 (reaching the same conclusion).[1] These decisions conflict with the Ninth Circuit's holding in *Chapman* that "convictions under this statute require at least some form of assault." 528 F.3d at 1221.

The Fifth and Sixth Circuit decisions also conflict with other courts of appeals concerning the meaning of the phrase "simple assault" in § 111(a). The majority of circuits hold that "simple assault" in

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[1] Last term, the Court denied a petition for certiorari in *Gagnon*. *See Gagnon v. United States*, 130 S. Ct. 115 (2009). But the facts of that case did not squarely present the question at issue here. There, the defendant intentionally vomited on a federal officer—plainly an assaultive act, even if not necessarily a "simple" one. *See Gagnon*, 553 F.3d at 1021-22; *see also People v. Cheatum*, No. 255261, 2005 WL 1652221, at *2-3 (Mich. App. 2005) (upholding conviction for assault where a prison employee intentionally spit on a corrections officer). In this case, by contrast, there is no dispute that Mrs. Williams's conduct did not qualify as an assault under the common law.

§ 111(a) means common-law assault—in essence, attempted or threatened battery. *See, e.g.*, *United States v. Chestaro*, 197 F.3d 600, 605 (2d Cir. 1999) ("Because Congress was silent as to the meaning of 'simple assault' . . . , it may safely be assumed . . . that Congress intended . . . to incorporate the common-law definition"); *accord Chapman*, 528 F.3d at 1219; *Vallery*, 437 F.3d at 631-33; *United States v. Hathaway*, 318 F.3d 1001, 1007-08 (10th Cir. 2003); *United States v. Yates*, 304 F.3d 818, 821-22 (8th Cir. 2002); *United States v. McCulligan*, 256 F.3d 97, 102-04 (10th Cir. 2001).

In fact, before the Sixth Circuit's decision in *Gagnon*, the courts of appeals were essentially unanimous in holding that "simple assault" for purposes of § 111(a) meant assault as defined by reference to the common law. Even the Fifth Circuit had agreed with this view. *See Ramirez*, 233 F.3d at 321-22 ("'[S]imple assault' [has] its common law meaning under 18 U.S.C. § 111 . . . ."); *accord Hazlewood*, 526 F.3d at 864-66.

The Fifth and Sixth Circuits have now, however, parted company with the other circuits by holding that "'simple assault' [is] a term of art that includes the forcible performance of any of the six proscribed actions in § 111(a) *without* the intent to cause physical contact or to commit a serious felony." *Gagnon*, 553 F.3d at 1027; *see also* App. 10a (same). This departure from precedent was necessary to reach the conclusion that "simple assault" misdemeanors can be proven even in the absence of any underlying assaultive conduct. After all, if a "simple assault" for purposes of § 111(a) requires attempted or threatened battery—as a majority of

the circuits had held—then one could hardly be convicted of "simple assault" where no acts constituting attempted or threatened battery are alleged in the indictment or proven at trial. *See Chapman*, 528 F.3d at 1219 (explaining that the prevailing interpretation of § 111 "leaves no room for a conviction that does not involve at least some form of assault"). The Fifth Circuit's decision in this case thus exacerbates what is now a clearly-defined split of authority among the federal courts of appeals about the proper interpretation of "simple assault" in § 111(a).

Recent amendments to § 111 did not resolve the circuit split but instead addressed a different ambiguity in the statute. Prior to amendment, § 111(a) set out three separate offenses depending on the nature of the acts in violation of the section: "simple assault" (lowest tier); "us[ing] a deadly or dangerous weapon . . . or inflict[ing] bodily injury" (highest tier); and "all other cases" (middle tier). *See* 18 U.S.C. § 111 (2006). The 2008 amendments simply provided a more descriptive definition of the middle tier category, replacing the words "all other cases" with "acts involv[ing] physical contact with the victim of th[e] assault or the intent to commit another felony." Act of Jan. 7, 2008, Pub. L. No. 110-177, Title II, § 208(b), 121 Stat. 2538.

Notably, the courts of appeals had already interpreted "all other cases," as it appeared in § 111(a), to include what the amended language now specifies, albeit with subtle variations across the circuits. The Second and Fifth Circuits, for example, construed "all other cases" to mean "assault that does involve contact but does not result in bodily

injury or involve a weapon," *Chestaro*, 197 F.3d at 606; *Ramirez*, 233 F.3d at 321-22, while the Eighth and Tenth Circuit Circuits interpreted it to mean "any assault that involves actual physical contact or the intent to commit murder or any felony other than those referred to in § 113(a)(2) but does not involve a deadly or dangerous weapon or bodily injury," *Hathaway*, 318 F.3d at 1008-09; *Yates*, 304 F.3d at 823. The 2008 amendment resolved this ambiguity by adopting the Eight and Tenth Circuit's approach. *See Chapman*, 528 F.3d at 1219-20.

The amendments did not, however, alter the language of the "simple assault" misdemeanor for which Mrs. Williams was convicted. Nor did they resolve whether one can be convicted of simple assault without being charged with any assaultive conduct. Even the Sixth Circuit, in setting forth the interpretation that the Fifth Circuit adopted in this case, conceded that "Congress's amendment does little to clarify the primary question in this appeal: whether § 111 is limited only to assaults or includes all the actions spelled out in § 111(a)." *Gagnon*, 553 F.3d at 1025 n.4; *see also id.* at 1024 n.2 ("[T]he amendments do not directly resolve the ambiguity at issue here."). As such, the circuit split raised by this petition was not resolved by the 2008 amendments and still requires resolution by this Court.

II. The Fifth Circuit's Decision Contravenes The Plain Meaning Of The Statute And Misapplies Well-Settled Canons of Statutory Construction.

The Fifth and Sixth Circuits created this split of authority by ignoring the plain meaning of § 111's text and by misapplying—or failing to apply—well-recognized principles of statutory construction.

Because § 111 does not provide its own definition of "simple assault," the plain meaning of those words should be the beginning and end of this case. *See FDIC v. Meyer*, 510 U.S. 471, 476 (1994) ("In the absence of . . . a definition, we construe a statutory term in accordance with its ordinary or natural meaning."). As Congress chose to use a term that has an "accumulated settled meaning under . . . the common law" and did not otherwise define the term, the courts must infer that Congress meant "to incorporate the established [common-law] meaning of the[ ] term[ ]." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992) (quoting *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989)); *see also, e.g., Wilkie v. Robbins*, 551 U.S. 537, 564 (2007) (holding that the term "extortion" as used in the Hobbs Act incorporates its common-law meaning).

Courts have done just that, with the circuits reaching widespread agreement that "simple assault," as it appears in § 111(a), must incorporate the common-law definition of assault. *See Chestaro*, 197 F.3d at 605; *Chapman*, 528 F.3d at 1219; *Vallery*, 437 F.3d at 631-33; *Hathaway*, 318 F.3d at 1007-08; *Yates*, 304 F.3d at 821-22; *McCulligan*, 256 F.3d at 102-04; *United States v. Campbell*, 259 F.3d

293, 296 & n.3 (4th Cir. 2001); *cf. United States v. Passaro*, 577 F.3d 207, 217-18 (4th Cir. 2009) ("[C]ourts have uniformly recognized that various federal statutes criminalizing 'assault' incorporate the long-established common law definition of that term."). Until Mrs. Williams's appeal, the Fifth Circuit was no different. It had also followed this approach. See *Ramirez*, 233 F.3d at 321-22.

The Fifth Circuit now holds, however, that "simple assault" under § 111(a) is actually a "term-of-art" that carries a meaning that is wholly inconsistent with the common-law definition that Congress intended. In so holding, the court expands the scope of the "simple assault" misdemeanor well beyond conduct that constituted assault under the common law. While this interpretation allows the Fifth Circuit to affirm Mrs. Williams's conviction, it bears the fundamental flaw of obscuring what was one of the clearest provisions of the statute: only a "simple assault" that does not involve physical contact constitutes a misdemeanor violation of § 111.

The Fifth Circuit's decision to redefine "simple assault" as a "term of art" is also inconsistent with the well-established meaning of simple assault as it appears in other criminal statutes. Section 113 of Title 18, for instance, prohibits seven different types of "assault" committed within the maritime or territorial jurisdiction of the United States, including "simple assault." *See* 18 U.S.C. § 113(a). Because the term is not defined explicitly within the statute but is defined by its contrast with the other six types of assault listed in § 113—"assault with intent to commit murder," "assault with intent to commit [other felonies]," "assault with a dangerous weapon,"

"assault by striking, beating, or wounding," "assault resulting in serious bodily injury," and "assault resulting in substantial bodily injury [to minors under 16]"—it is well-settled that "simple assault" in § 113 "embrace[s] the common law meaning of that term." *United States v. Stewart*, 568 F.2d 501, 504 (6th Cir. 1978); *see also United States v. Bayes*, 210 F.3d 64, 68 (1st Cir. 2000); *United States v. Delis*, 558 F.3d 177, 180 (2d Cir. 2009); *United States v. Estrada-Fernandez*, 150 F.3d 491, 494 n.1 (5th Cir. 1998); *United State v. Rocha*, 598 F.3d 1144, 1148-49 (9th Cir. 2010); *United States v. Juvenile Male*, 930 F.2d 727, 728 (9th Cir. 1991).

Indeed, numerous circuits have reached this very conclusion. *See Chestaro*, 197 F.3d at 605 ("Because Congress was silent as to the meaning of 'simple assault' . . . , it may safely be assumed . . . that Congress intended to adopt the term as used in § 113, which in turn has been construed, appropriately in our view, to incorporate the common-law definition."); *Hathaway*, 318 F.3d 1008 ("'[S]imple assault' in § 111 should be defined by reference both to the common law meaning of assault and to the meaning of 'simple assault' as Congress used that phrase in § 113.'"); *McCulligan*, 256 F.3d at 104 ("The similar language of [§ 113] . . . lends support to the conclusion that 'simple assault' equates with traditional common-law assault."). The Fifth Circuit's refusal to ascribe to § 111's "simple assault" the well recognized common-law definition employed in § 113 is yet another departure from sound principles of statutory construction and the weight of authority among the circuits.

Furthermore, in holding that one may be convicted of "simple assault" despite not having committed an assault, the Fifth Circuit offers a construction of § 111 that is unconstitutionally vague and that may lead to absurd results. Under the Fifth Circuit's view, a "simple assault" misdemeanor under § 111(a) encompasses any act in which one "forcibly . . . resists, opposes, impedes, intimidates, or interferes with" any federal officers in the performance of their duties. App. 10a. Such a conclusion necessarily would require citizens, law enforcement, and courts to know what it means, for example, to forcibly impede or forcibly intimidate a federal officer. But these terms are hopelessly vague. The Fifth Circuit's interpretation provides no limiting guidance and thus renders § 111 unworkable and unconstitutionally vague.

Similarly, the Fifth Circuit's construction of § 111 generates absurd results that cannot plausibly be ascribed to the intent of Congress. As the Ninth Circuit explained in *Chapman*, a defendant who intended maliciously but unsuccessfully to punch an arresting officer would be guilty under § 111(a) of misdemeanor "simple assault." At the same time, however, a defendant who made incidental contact with an officer while merely flinching from handcuffs would be guilty under § 111(a) of a felony for making "physical contact" with the victim of that assault. *See Chapman*, 528 F.3d at 1220-21; *Vallery*, 437 F.3d at 633 (same). Indeed, it seems Mrs. Williams was only spared being convicted of a felony, along with a potential sentence of up to eight years for each count, merely because the government neglected to plead physical contact in the indictment. App. 13a.

The only reasonable interpretation of § 111(a), and the interpretation that still prevails in the majority of circuits, avoids the risk of confusion and the prospect of absurd results by construing "simple assault" to carry its common-law meaning. Under this view, as applied by the Ninth Circuit in *Chapman*, the government must plead and prove the elements of assault in order to obtain a conviction for "simple assault" under § 111. This approach provides a concrete and well recognizable rule indicating which conduct is proscribed and which is not, and it also increases the likelihood that only the most morally blameworthy conduct is subject to the felony-level punishments set out in the statute.

Finally, if the term "simple assault" is so ambiguous as to represent merely a term of art that is divorced from its common-law meaning, then the rule of lenity would require interpreting the term in favor of Mrs. Williams. In cases of ambiguous criminal statutes, "the tie must go to the defendant." *United States v. Santos*, 553 U.S. 507, 128 S. Ct. 2020, 2025 (2008); *United States v. Bass*, 404 U.S. 336, 347-349 (1971). The common-law definition of "simple assault" must therefore prevail because its stricter requirements for prosecution are always "more defendant-friendly" than the Fifth and Sixth Circuit's minority interpretation. *Santos*, 128 S. Ct. at 2025.

Although it disregarded these principles of statutory construction, the Fifth Circuit purported to apply two other principles—the presumption against superfluity and inferences from legislative silence—to conclude that "'simple assault' is a 'term of art that includes the forcible performance of any of the

six proscribed actions in § 111(a).'" App. at 10a (quoting *Gagnon*, 553 F.3d at 1027). But the Fifth Circuit's analysis is flawed on both grounds.

First, the Fifth Circuit erred in reasoning that requiring proof of assaultive conduct to convict a defendant of the "simple assault" misdemeanor would "render meaningless" the five forms of non-assaultive conduct in subsection (a)(1)—"resists, opposes, impedes, intimidates, or interferes." App. 10a. The court's approach is wrong because interpreting "simple assault" to require proof of an assault would not make those five forms of non-assaultive conduct superfluous for *all* aspects of § 111—that is, *for the statute as a whole*. Statutory phrases, after all, must not be "construe[d] in isolation," but rather read in the context of the "statute[] as a whole." *Samantar v. Yousuf*, 130 S. Ct. 2278, 2289 (2010) (quoting *United States v. Morton*, 467 U.S. 822, 828 (1984)). The five forms of non-assaultive conduct listed in § 111(a) would inform, for example, the "any acts" portion of the felony offense established in § 111(b). Under this interpretation, the non-assaultive "intimidate" in § 111(a) is an "act" which would, under § 111(b), constitute a felony when coupled with (b)'s "use[ ] of a deadly or dangerous weapon." The Fifth Circuit was incorrect, therefore, to assume that it needed to deprive "simple assault" of its established meaning in order to give effect to each of the terms in § 111.

Second, the Fifth Circuit improperly inferred Congress's approval of a term-of-art interpretation of "simple assault" where no such approval existed. In 2008, Congress amended § 111(a) to clarify an unrelated ambiguity regarding the distinction

between misdemeanors and felonies. *Compare* 18 U.S.C. § 111(a) (2008) (striking out "all other cases" from the pre-2008 statute and replacing it with more specific language) *with* 18 U.S.C. § 111(a) (2002). Because Congress did not alter the definition of "simple assault" at the same time, the Fifth Circuit somehow inferred from this silence Congress's approval of a term-of-art interpretation which "supports the conclusion that § 111(a)(1) prohibits more than assault, simple or otherwise." *See* App. at 11a.

As this Court has held, however, such a non-barking dog of legislative inaction "lacks persuasive significance." *Central Bank of Denver, N.A., v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (quoting *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)); *see also Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969) ("Congressional inaction frequently betokens unawareness, preoccupation, or paralysis.").

Moreover, the real reason Congress did not clarify the definition of "simple assault" in 2008 was that it was unaware of the term's ambiguity. Although the Fifth Circuit asserts that the 2008 amendment "addressed the ambiguity identified by the Ninth Circuit [in *Chapman*], App. at 11a, the Ninth Circuit had not even identified that ambiguity or issued its decision in *Chapman* until *after* the 2008 amendment. And as the legislative history shows, Senator Kyl noted that the 2008 revisions to § 111(a) "clarifi[ed] an *assault offense* that was created by Congress in 1994" and were designed to "correct [the] legislative sin" of the vague phrase "all other cases" in the pre-2008 version. 153 Cong. Rec. S15789-01

(2007) (statement of Senator Kyl) (emphasis added). Nothing in the legislative record remotely suggests that Congress was aware of the ambiguity in construing "simple assault" when it drafted the 2008 revisions. Congress simply avoided the "simple assault" term in § 111(a); nothing can be inferred from its inaction.

Accordingly, the Fifth Circuit's analysis rests on a flawed application of principles of statutory construction, and ignores the only reasonable interpretation of the statute. As a result, the court incorrectly affirmed Mrs. Williams's conviction for "simple assault" in the absence of proof that an assault had occurred.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari and either summarily reverse the judgment below or set the case for plenary review.

Respectfully submitted,

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August 12, 2010

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 09-50059

Filed: March 23, 2010

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

- v.-

MARIA HENRIETTA WILLIAMS, also known as Maria H. Williams,

Defendant-Appellant

Appeal from the United States District Court for the Western District of Texas

Before GARZA, DeMOSS, and CLEMENT, Circuit Judges.

EDITH BROWN CLEMENT, Circuit Judge:

Maria Williams appeals her conviction on two counts of forcible assault of a federal officer under 18 U.S.C. § 111(a)(1). She also argues that an

undisputed *Apprendi* error at sentencing requires the court to vacate her sentence and remand for resentencing. We affirm in part and vacate and remand in part.

FACTS AND PROCEEDINGS

Maria Williams was arrested on May 31, 2008, in El Paso for forcibly resisting or assaulting a federal officer in violation of 18 U.S.C. § 111(a)(1). Military police officers Harris and Putnam and Sergeant Eichmann responded to a complaint a neighbor made against Williams for indecent exposure. When Eichmann asked Williams if someone could watch her child while he discussed the complaint with her, she became upset and stated that she would not be arrested or go to jail. Eichmann then ordered Harris and Putnam to detain Williams. She informed the officers that she should not be handcuffed because she suffered from fibromyalgia syndrome, which causes her to suffer extreme pain when touched.[1]

Harris testified that when she attempted to handcuff Williams, Williams was holding a lit cigarette and "swinging her arms at us. The cigarette was my main focus at that point. We asked her to put it out, but she refused. The cigarette was swinging everywhere, . . . and I couldn't get a grip on

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[1] At trial, Williams's physician confirmed the diagnosis.

one of her hands." Eichmann ordered Harris to use force. Harris testified that she grabbed Williams's wrist and shoulder in order to spin Williams to the ground. However, there was not enough room for Harris to put Williams on the ground, and both of them fell against a fence. As the two struggled, Williams pulled her arm away and as she did so she struck Harris on the side of her face. Eichmann then ordered Putnam to assist Harris, but when Putnam attempted to force Williams to the ground, Williams pulled away and struck him in the jaw. Putnam testified that he did not believe that Williams intentionally hit him, and Eichmann's statement about whether Williams meant to hit Putnam was also ambiguous: he testified that "[i]t wasn't like she was trying to fight with us, but we weren't going to take her." After Williams was taken into custody by FBI agents, she told them that she moved her arms so that the officers could not handcuff her.

The grand jury returned a two-count indictment against Williams. Both counts charged her with violating § 111(a)(1), without reference to any physical contact between Williams and the officers. At trial, Williams moved for judgment of acquittal at the close of the Government's case and renewed her motion after she presented her defense. After the court denied her motions, the jury found Williams guilty on both counts. The presentence report (PSR) characterized Williams's offenses as class D felonies pursuant to 18 U.S.C. § 111(a)(2)—with a statutory maximum of eight years of imprisonment and three

years of supervised release—because they involved physical contact with the arresting officers. The PSR assessed a total offense level of 15: a base level of 10, a 2-level enhancement for multiple counts, and a 3-level enhancement because the conduct involved physical contact with the officers. Williams's criminal history category of II[2] and total offense level of 15 yielded a guidelines range of 21-27 months' imprisonment. Williams objected to the enhancement for multiple counts and requested a variance. The district court overruled the objection and rejected the request for a variance. The district court adopted the PSR and sentenced Williams to 21 months of imprisonment and two years of supervised release on each count, to run concurrently.

STANDARD OF REVIEW

Because Williams properly preserved her sufficiency of the evidence argument, this court's review is de novo. *See United States v. Shum*, 496 F.3d 390, 391 (5th Cir. 2007). "In deciding whether the evidence was sufficient, we review all evidence in the light most favorable to the verdict to determine whether a rational trier of fact could have found that

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[2] In 1982, when 18 years old, Williams pleaded no contest to manslaughter charges in the death of her 15-month-old child. She also had a 1982 conviction for forgery and a 1984 conviction for escaping from custody.

the evidence established the essential elements of the offense beyond a reasonable doubt." *Id.* The court "consider[s] the countervailing evidence as well as the evidence that supports the verdict in assessing sufficiency of the evidence." *United States v. Brown*, 186 F.3d 661, 664 (5th Cir. 1999) (quotation omitted). The evidence is insufficient to support the verdict "[i]f . . . the evidence gives equal or nearly equal circumstantial support to a theory of guilt, as well as to a theory of innocence." *United States v. Ferguson*, 211 F.3d 878, 882 (5th Cir. 2000).

The sufficiency challenge requires determining what conduct constitutes an offense under § 111(a)(1). The court reviews questions of statutory interpretation de novo. *United States v. Kay*, 359 F.3d 738, 742 (5th Cir. 2004).

DISCUSSION

A. Williams's Conviction

While Williams's appeal is couched as a sufficiency of the evidence challenge, deciding it requires us to construe—as a matter of first impression in this circuit—the boundaries of the statute under which she was convicted. Section 111 provides, in relevant part:

> (a) In general—Whoever—
>
> (1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any [federal officer] while engaged in or on account of the performance of official duties;

. . .

> shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both, and where such acts involve physical contact with the victim of that assault or the intent to commit another felony, be fined under this title or imprisoned not more than 8 years, or both.
>
> (b) Enhanced penalty.—Whoever, in the commission of any acts described in subsection (a), uses a deadly or dangerous weapon (including a weapon intended to cause death or danger but that fails to do so by reason of a defective component) or inflicts bodily injury, shall be fined under this title or imprisoned not more than 20 years, or both.

As discussed in cases in other circuits, the statute contains two ambiguities. First, it distinguishes between misdemeanor and felony conduct by use of the undefined term "simple assault." Second, and central to this case, the statute appears to outlaw several forms of conduct directed against federal officers, only one of which is assault, but then distinguishes between misdemeanors and felonies by reference to the crime of assault. The difficulty that has confronted other courts is whether conviction for the non-assaultive conduct apparently outlawed by the statute (*i.e.*, "resist[ing], oppos[ing], imped[ing],

intimidat[ing], or interfer[ing]" with a federal officer) requires, at a minimum, conduct that amounts to "simple assault." To put the question another way, can a defendant be convicted of forcible resistance under this statute without having committed an underlying assault? Williams argues that criminal liability under § 111(a)(1) requires conduct amounting to an assault and, arguing that there was insufficient evidence of such, asks us to vacate the judgment against her.

"[T]his circuit has interpreted . . . § 111 to create three separate offenses: '(1) simple assault; (2) more serious assaults but not involving a dangerous weapon; and (3) assault with a dangerous weapon.' " *United States v. Williams,* 520 F.3d 414, 420 (5th Cir.) (quoting *United States v. Ramirez,* 233 F.3d 318, 321 (5th Cir. 2000), *overruled on other grounds by United States v. Cotton,* 535 U.S. 625, 629-31, (2002)), *cert. denied*, 129 S. Ct. 111, (2008) (mem.). We have held that simple assault is a misdemeanor offense under § 111(a) and defined simple assault as an attempted or threatened battery. *United States v. Hazlewood,* 526 F.3d 862, 865 (5th Cir. 2008) (citing *Ramirez,* 233 F.3d at 321-22; *United States v. Vallery,* 437 F.3d 626, 631 (7th Cir. 2006)). By implication, the other two forms of assault are felonies under the statute. However, this court has

never ruled on whether the additional conduct proscribed in § 111(a)(1) requires, at a minimum, underlying assaultive conduct.[3]

Several circuits have split on this question. In *United States v. Chapman*, the Ninth Circuit held that convictions under the statute "require at least some form of assault." 528 F.3d 1215, 1221 (9th Cir. 2008). Construing an earlier version of the statute,[4]

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[3] *Williams*'s interpretation of § 111 as creating three assault offenses does not mean that the Fifth Circuit requires assaultive conduct for all convictions under § 111(a)(1). In both *Williams* and *Ramirez*, the defendants were charged with and tried for assault, rather than for any of the other conduct proscribed by § 111(a)(1). In neither case was the court considering whether a conviction under the statute required an underlying assault. Instead, it was interpreting § 111 in light of Supreme Court precedent requiring courts to construe statutes setting out separate punishments as creating separate, independent criminal offenses with different elements rather than a single criminal offense with different levels of punishment. *See Jones v. United States*, 526 U.S. 227 (1999). Accordingly, the language cited from those cases, regarding the division of the statute into three separate offenses, does not control the issue presented here.

[4] The "penalty" provision of the earlier version of the statute read:

> where the acts in violation of this section constitute only simple assault, [a convicted defendant shall] be fined under this title or imprisoned not more than one

the Ninth Circuit noted that other circuits "have adopted a construction that leaves no room for a conviction that does not involve at least some form of assault." *Id.* at 1219. More importantly, the Ninth Circuit argued that without requiring some sort of underlying assault, it would be impossible to distinguish non-assaultive misdemeanor resistance cases from felonious resistance cases, because the now-superseded "statutory language clearly limits the category of 'misdemeanors' to cases of 'simple assault' and then categorizes 'all other cases' felonies." *Id.* at 1220. "If Congress had intended to prohibit both assaultive and non-assaultive conduct and intended to distinguish between misdemeanors and felonies based solely on physical contact, it easily could have said so." *Id.* at 1221. To hold that non-assaultive conduct was proscribed by the statute would lead to absurd results, the Ninth Circuit suggested, because "in cases of mere resistance, it is not at all clear that resistance with physical contact is any more culpable than resistance without such contact, especially when . . . the physical contact is

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> year, or both, *and in all other cases,* be fined under this title or imprisoned not more than 8 years, or both.

18 U.S.C. § 111(a) (2002) (emphasis added) (effective November 2, 2002 to January 6, 2008).

initiated by the *arresting officer* rather than by the arrestee." *Id.*

The Sixth Circuit, also construing the earlier version of the statute, reached the opposite conclusion. The court reasoned that interpreting § 111(a)(1) as requiring an underlying assault for a defendant to be convicted would render meaningless the five forms of non-assaultive conduct that are plainly proscribed by the statute. *United States v. Gagnon*, 553 F.3d 1021, 1026 (6th Cir. 2009). "Congress left much open with § 111 . . . but that is no excuse to ignore what it plainly does say." *Id.* Under this reading, the phrase "simple assault" is "a term of art that includes the forcible performance of any of the six proscribed actions in § 111(a) *without* the intent to cause physical contact or to commit a serious felony" while "'all other cases' covers the commission of these same violations *plus* the intent to commit a felony or resulting physical contact." *Id.* at 1027. The Ninth Circuit's concern about the difficulty of determining whether a defendant was culpable for physical contact initiated by an arresting officer was misplaced, since any such contact would not have been "forcibly" initiated by the defendant and thus would not be proscribed by the statute. *Id.*; *see also United States v. Arrington*, 309 F.3d 40, 44 (D.C.Cir. 2002) ("[A] defendant does not violate [§ 111(a)] unless he *forcibly* assaults or *forcibly* resists or *forcibly* opposes, etc."); *United States v. Schrader*, 10 F.3d 1345, 1348 (8th Cir.

1993) ("Force is a necessary element of any § 111 violation.").

Even before the recent change in the statute, the Sixth Circuit rule was the better one, as it avoided rendering superfluous the other five forms of conduct proscribed by § 111(a)(1). The recent change in the statutory language—striking out "all other cases" in the penalty provision of the statute and specifying that the line between misdemeanors and felonies is drawn at physical contact or acting with the intent to commit another crime—also supports the conclusion that § 111(a)(1) prohibits more than assault, simple or otherwise. Congress addressed the ambiguity identified by the Ninth Circuit by explicitly drawing the misdemeanor/felony line at physical contact, but it declined the opportunity to delete the other forms of conduct proscribed by the statute or to otherwise clarify that § 111(a)(1) convictions require an underlying assault. Finally, the Sixth Circuit's approach is more consonant with the dual purpose of the statute, which, the Supreme Court has noted, is not simply to protect federal officers by punishing assault, but also to "deter interference with federal law enforcement activities" and ensure the integrity of federal operations by punishing obstruction and other forms of resistance. *United States v. Feola*, 420 U.S. 671, 678 (1975); *see also id.* at 679-82 (discussing the legislative history of § 111's predecessor statute). We adopt the Sixth Circuit rule and hold that a misdemeanor conviction

under § 111(a)(1) does not require underlying assaultive conduct.

With the adoption of this rule, this case becomes straightforward. There is ample evidence that Williams "forcibly . . . resist [ed]" federal officers. In fact, Williams admitted after being arrested that she swung her arms for the specific purpose of resisting the officers' attempts to handcuff her. We affirm Williams's conviction.

B. Williams's Sentence

Williams argues that the district court committed plain error in sentencing her to 21 months of imprisonment and two years of supervised release on each count, because she was convicted of misdemeanors that are punishable by no more than 12 months of imprisonment and 12 months of supervised release. Williams did not challenge her sentence at the district court and thus this court's review is for plain error. *See United States v. Gonzalez-Ramirez*, 477 F.3d 310, 311-12 (5th Cir. 2007). To establish plain error, Williams must show that (1) there was error, (2) the error was plain, and (3) the error affected her substantial rights (the "prejudice prong"). *Id.* If plain error is established, the court may exercise its discretion to grant relief, but "only if the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings" (the "fairness prong"). *Id.* (quotation marks omitted).

The parties agree that there was plain error under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The fact of physical contact with the officers was neither charged in the indictment nor submitted to the jury. Under *Hazlewood*, which was issued several weeks before Williams's arrest and almost two months before the grand jury returned the indictment against her, such an indictment charges only misdemeanor assault. 526 F.3d at 866. The statutory maximum for a misdemeanor offense under § 111(a) is not more than 12 months of imprisonment and not more than 12 months of supervised release. The district court enhanced Williams's base offense level by three points because her conduct involved physical contact with the officers, which resulted in a guidelines range of 21-27 months' imprisonment. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490.

The parties differ as to whether the error affected Williams's substantial rights. In determining whether an error affects a defendant's substantial rights, we ask "whether the error increased the term of a sentence, such that there is a reasonable probability of a lower sentence on remand." *United States v. Garcia-Quintanilla*, 574 F.3d 295, 304 (5th Cir. 2009). Williams notes that the finding of physical conduct enabled the district court to

sentence her to a term of imprisonment in excess of the statutory maximum. The government counters by arguing that the district court could have sentenced Williams to 21 months by running her sentences on the two counts consecutively.

This argument fails. Without the three-level enhancement for physical contact, Williams's offense level would have been 12, which combined with a criminal history category of II yields a guidelines range of 12-18 months' imprisonment. This case, then, presents the rare instance where the appropriate guidelines range exceeds the statutory maximum for the offense. Although the district court could have imposed consecutive sentences on each count, under the terms of § 5G1.2(d) of the sentencing guidelines, it can do so "only to the extent necessary to produce a combined sentence equal to the total punishment"—*i.e.*, equal to the top of the guidelines range. U.S.S.G. § 5G1.2(d). Any sentence above 18 months, the top of that range, would be an upward departure. In this case, the district court ran the sentences concurrently and sentenced Williams at the bottom of what it believed to be the correct guidelines range; the district court made no findings in its written order of judgment supporting an upward departure; and there is no indication that the district court would have upwardly departed had it sentenced Williams under the correct guidelines range. Indeed, the district judge noted at sentencing that "a guideline sentence is appropriate and reasonable."

This case is similar to *United States v. Vasquez-Zamora*, in which this court remanded for resentencing after the *Apprendi* error that occurred when the district court sentenced a defendant to concurrent 65-month terms of imprisonment despite a statutory maximum imprisonment term of 60 months. 253 F.3d 211, 214 (5th Cir. 2001). The government argued that the district court could have run the terms consecutively to reach the same 65-month sentence, but we rejected that argument and remanded to permit the district court to fashion an appropriate sentence in the first instance. *Id.*; *see also United States v. Dentler*, 492 F.3d 306, 313-14 (5th Cir. 2007) (rejecting argument that district court's numerous comments at sentencing suggesting that it sought to impose stiffest penalty possible demonstrated that sentencing error did not substantially prejudice defendant's rights). There is a reasonable probability that Williams's sentence would have been different absent the error, and accordingly her substantial rights have been prejudiced. *Garcia-Quintanilla*, 574 F.3d at 303-04.[5]

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[5] The government cited to several Seventh and Eighth Circuit cases suggesting that a defendant does not satisfy plain error review when the district court could have imposed consecutive rather than concurrent sentences to achieve the same sentence. *See United States v. Gray*, 332 F.3d 491, 493 (7th Cir. 2003); *United States v. Diaz*, 296 F.3d 680, 683-84 (8th Cir. 2002) (en

Finally, the parties disagree as to whether we should find that the plain error affected the fairness, integrity, or public reputation of judicial proceedings and exercise our discretion to remedy the error. We have taken "a generally permissive approach" to both the prejudice and fairness prongs of plain error review. *United States v. Ellis*, 564 F.3d 370, 378 n.44 (5th Cir. 2009). We have generally found that sentencing errors resulting in terms of imprisonment that exceed the correct guidelines range do affect the fairness, integrity, or public reputation of judicial proceedings. *See, e.g., United States v. Aderholt*, 87 F.3d 740, 744 (5th Cir. 1996). In this case, the sentence exceeds the statutory maximum by nine months, a 75 percent increase. Given this excess over the statutory maximum and the permissiveness with which the court has construed the fairness prong, we hold that the sentence in this case affects the fairness, integrity, or public reputation of judicial proceedings. Accordingly, we vacate Williams's sentence and remand to the district court for resentencing. We express no opinion as to the appropriate sentence.

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banc); *United States v. Sturgis*, 238 F.3d 956, 960-61 (8th Cir. 2001). These cases are distinguishable. In each one, the court was upholding a sentence that would have been given anyway on remand through the application of U.S.S.G. § 5G1.2(d) without requiring, as here, an upward departure.

CONCLUSION

The judgment of the district court is **AFFIRMED** as to appellant's conviction. However, in light of the foregoing we **VACATE** her sentence and **REMAND** to the district court for resentencing.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA	) EP-08-CR-1832-DB
vs.	) El Paso, Texas
MARIA HENRIETTA WILLIAMS	) October 29, 2008

VOLUME III OF IV VOLUMES
JURY TRIAL
BEFORE THE HONORABLE DAVID BRIONES
UNITED STATES DISTRICT JUDGE,
and a jury.

APPEARANCES:

FOR THE GOVERNMENT:

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FOR THE DEFENDANT:

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Proceedings reported by stenotype. Transcript produced by computer-aided transcription.

Trial Transcript (Vol. III): 128:12 - 129:2

MR. LEWIS: At this time, Your Honor, the United States rests.

THE COURT: Mr. Kimmelman?

MR. KIMMELMAN: May we make a motion, Your Honor?

THE COURT: Make it up here, because I'm not going to take a recess at this time.

(Bench discussion outside the hearing of the jury.)

MR. KIMMELMAN: Your Honor, at this time, the Defense makes a Motion for Judgment of Acquittal on the grounds that the Government has failed to adduce sufficient evidence to raise -- to demonstrate that the Defendant is guilty beyond a reasonable doubt on each of the elements of the offenses charged.

THE COURT: Motion for Judgment of Acquittal is overruled.

MR. KIMMELMAN: Thank you, Your Honor.

Trial Transcript (Vol. III): 174:18 - 175:2

(Open court; outside the presence of the jury.)

THE COURT: Do you have a motion, Mr. Kimmelman?

MR. KIMMELMAN: Yes, sir.

Your Honor, at this time the, Defense would renew its Motion for Judgment of Acquittal. The Government failed to -- having failed to raise sufficient evidence to show beyond a reasonable doubt that Mrs. Williams is guilty, based on the elements of the charged offenses.

THE COURT: Motion for Judgment of Acquittal is overruled.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 09-50059

Filed: May 14, 2010

UNITED STATES OF AMERICA,

Plaintiff - Appellee

- v.-

MARIA HENRIETTA WILLIAMS, also known as Maria H. Williams,

Defendant - Appellant

Appeal from the United States District Court for the Western District of Texas, El Paso

---

ON PETITION FOR REHEARING

Before GARZA, DeMOSS, and CLEMENT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

E.B. Clement

United States Circuit Judge

18 U.S.C. § 111 (current version)

(Effective January 7, 2008 to present)

§ 111. Assaulting, resisting, or impeding certain officers or employees

(a) In general.—Whoever—

> **(1)** forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of official duties; or
>
> **(2)** forcibly assaults or intimidates any person who formerly served as a person designated in section 1114 on account of the performance of official duties during such person's term of service,

shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both, and where such acts involve physical contact with the victim of that assault or the intent to commit another felony, be fined under this title or imprisoned not more than 8 years, or both.

(b) Enhanced penalty.—Whoever, in the commission of any acts described in subsection (a), uses a deadly or dangerous weapon (including a weapon intended to cause death or danger but that fails to do so by reason of a defective component) or

inflicts bodily injury, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 111 (prior version)

(Effective November 2, 2002 to January 6, 2008)

§ 111. Assaulting, resisting, or impeding certain officers or employees

(a) In general—Whoever—

> **(1)** forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of official duties; or
>
> **(2)** forcibly assaults or intimidates any person who formerly served as a person designated in section 1114 on account of the performance of official duties during such person's term of service,

shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both, and in all other cases, be fined under this title or imprisoned not more than 8 years, or both.

(b) Enhanced penalty.—Whoever, in the commission of any acts described in subsection (a), uses a deadly or dangerous weapon (including a weapon intended to cause death or danger but that fails to do so by reason of a defective component) or inflicts bodily injury, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 113 (current version)

(Effective October 11, 1996 to present)

§ 113. Assaults within maritime and territorial jurisdiction

(a) Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:

> **(1)** Assault with intent to commit murder, by imprisonment for not more than twenty years.
>
> **(2)** Assault with intent to commit any felony, except murder or a felony under chapter 109A, by a fine under this title or imprisonment for not more than ten years, or both.
>
> **(3)** Assault with a dangerous weapon, with intent to do bodily harm, and without just cause or excuse, by a fine under this title or imprisonment for not more than ten years, or both.
>
> **(4)** Assault by striking, beating, or wounding, by a fine under this title or imprisonment for not more than six months, or both.
>
> **(5)** Simple assault, by a fine under this title or imprisonment for not more than six months, or both, or if the victim of the assault is an individual who has not attained the age of 16 years, by fine under this title or imprisonment for not more than 1 year, or both.

(6) Assault resulting in serious bodily injury, by a fine under this title or imprisonment for not more than ten years, or both.

(7) Assault resulting in substantial bodily injury to an individual who has not attained the age of 16 years, by fine under this title or imprisonment for not more than 5 years, or both.

(b) As used in this subsection—

(1) the term "substantial bodily injury" means bodily injury which involves—

(A) a temporary but substantial disfigurement; or

(B) a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty; and

(2) the term "serious bodily injury" has the meaning given that term in section 1365 of this title.

(2)

Supreme Court, U.S.
FILED
OCT 13 2010

No. 10-212

In the Supreme Court of the United States

MARIA HENRIETTA WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was properly convicted of a misdemeanor violation of 18 U.S.C. 111(a)(1) on the basis of her physical resistance to being handcuffed by federal officers.

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In the Supreme Court of the United States

No. 10-212

MARIA HENRIETTA WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 602 F.3d 313.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 2010. A petition for rehearing was denied on May 14, 2010 (Pet. App. 23a-24a). The petition for a writ of certiorari was filed on August 12, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of two counts of forcibly assaulting, resisting, opposing, impeding, intimidating, and interfering with

federal officers, in violation of 18 U.S.C. 111(a)(1). She was sentenced to 21 months of imprisonment, to be followed by two years of supervised release. The court of appeals affirmed her convictions, but remanded for resentencing. Pet. App. 1a-17a.

1. Petitioner was convicted of violating 18 U.S.C. 111, which provides:

> (a) IN GENERAL.—Whoever—
>
> (1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of official duties; or
>
> (2) forcibly assaults or intimidates any person who formerly served as a person designated in section 1114 on account of the performance of official duties during such person's term of service,
>
> shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both, and where such acts involve physical contact with the victim of that assault or the intent to commit another felony, be fined under this title or imprisoned not more than 8 years, or both.
>
> (b) ENHANCED PENALTY.—Whoever, in the commission of any acts described in subsection (a), uses a deadly or dangerous weapon (including a weapon intended to cause death or danger but that fails to do so by reason of a defective component) or

> inflicts bodily injury, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. 111 (2006 & Supp II 2008) (reprinted at Pet. App. 25a-26a).

Before 2008, the statute prohibited the same conduct (in the same terms) and contained the same "enhanced penalty" provision, but included a different penalty structure in subsection (a). That subsection provided that, "where the acts in violation of this section constitute only simple assault, [the defendant shall] be fined under this title or imprisoned not more than one year, or both, and in all other cases, be fined under this title or imprisoned not more than 8 years, or both." 18 U.S.C. 111(a) (Supp. II 2002). Thus, when Congress amended Section 111 in 2007 (with the amendments to take effect in January 2008), it deleted from the penalty provision in subsection (a) the phrase "in all other cases," and substituted the phrase "where such acts involve physical contact with the victim of that assault or the intent to commit another felony." See Court Security Improvement Act of 2007, Pub. L. No. 110-177, § 208(b), 121 Stat. 2538.

2. On May 31, 2008, military police officers Harris and Putnam and Sergeant Eichmann went to petitioner's home in order to respond to a complaint lodged by a neighbor against petitioner for indecent exposure. Pet. App. 2a. When Sergeant Eichmann asked petitioner whether someone could watch her child while they discussed the complaint with her, petitioner became upset, and stated that she would not be arrested or go to jail. *Ibid.* Petitioner was very agitated and repeated several times that she would not go anywhere with the

officers. Gov't C.A. Br. 11-12. After unsuccessful attempts to calm petitioner down, Sergeant Eichmann decided to detain petitioner and ordered Officers Harris and Putman to take her into custody. *Id.* at 12-13; see Pet. App. 2a. Petitioner attempted unsuccessfully to flee. Gov't C.A. Br. 12-13. Officer Harris (the only female officer on the scene) then attempted to handcuff petitioner in a standing position. *Id.* at 13-14; see Pet. App. 2a. Petitioner stated to Officer Harris that petitioner should not be placed in handcuffs because she had previously had surgery on her wrist and suffered from fibromyalgia. Gov't C.A. Br. 17; Pet. App. 2a. Officer Harris responded that she was aware of the medical problems and was trying not to hurt petitioner. Gov't C.A. Br. 17.

When Officer Harris attempted to handcuff petitioner, petitioner started swinging her arms wildly around. Gov't C.A. Br. 14. In one of her swinging hands, petitioner held a lit cigarette. *Ibid.*; Pet. App. 2a-3a. The officers asked petitioner to put her cigarette out, but she refused. Gov't C.A. Br. 14; Pet. App. 2a. Because of the lit cigarette in petitioner's hand, Officer Harris was unable to get a grip on petitioner's arm. Gov't C.A. Br. 14, Pet. App. 2a-3a. Sergeant Eichmann then ordered Officer Harris to use force to secure petitioner. Gov't C.A. Br. 14; Pet. App. 3a. Officer Harris grabbed petitioner's wrist and shoulder in an attempt to put petitioner on the ground, but there was insufficient space to do so and both of them fell against a fence. Gov't C.A. Br. 14-15; Pet. App. 3a. Officer Harris testified that she could not get control of petitioner in part because petitioner continued to swing her arms around. Gov't C.A. Br. 15. As Officer Harris struggled with peti-

tioner, petitioner struck Officer Harris on the side of her face. *Ibid.*; Pet. App. 3a

At the direction of Sergeant Eichmann, Officer Putnam attempted to assist Officer Harris, but when he attempted to force petitioner to the ground, petitioner pulled away and struck him in the jaw. Gov't C.A. Br. 15-16; Pet. App. 3a. Officers Putnam and Harris were ultimately able to subdue and handcuff petitioner. Gov't C.A. Br. 16; Pet. App. 3a. Officer Putnam testified that he did not believe petitioner intentionally hit him; Sergeant Eichmann testified that "[i]t wasn't like she was trying to fight with us, but we weren't going to take her." Pet. App. 3a; see Gov't C.A. Br. 14-16. As Officer Harris escorted petitioner to the officers' car, petitioner screamed profanities at her neighbor, the complainant. Gov't C.A. Br. 16.

3. Petitioner was charged in an indictment with two counts of forcibly assaulting, resisting, opposing, impeding, intimidating, and interfering with a military police officer engaged in official duties, in violation of 18 U.S.C. 111(a)(1). The indictment did not refer to any physical contact between petitioner and the officers. Pet. App. 3a. The jury convicted petitioner of both counts. *Ibid.*

The presentence report prepared in connection with petitioner's sentencing characterized petitioner's offenses as class D felonies under 18 U.S.C. 111(a)(2)—which provides a statutory maximum of eight years of imprisonment—because the offenses involved physical contact with the arresting officers. Pet. App. 3a-4a. According to the Probation Office's Guidelines calculation, petitioner's advisory sentencing range was 21-27 months. *Id.* at 4a. The district court sentenced petitioner to concurrent terms of 21 months of imprison-

ment, to be followed by two years of supervised release. *Ibid.*

4. The court of appeals affirmed petitioner's convictions, but vacated her sentence, and remanded for resentencing. Pet. App. 1a-17a.

a. The court initially acknowledged that it had previously described Section 111 as creating three separate offenses: "(1) simple assault; (2) more serious assaults but not involving a dangerous weapon; and (3) assault with a dangerous weapon." Pet. App. 7a (citation omitted). The court went on, however, to reject petitioner's argument that Section 111's prohibition of "resist[ing], oppos[ing], imped[ing], intimidat[ing], or interfer[ing] with" a federal officer, 18 U.S.C. 111 (2006 & Supp. II 2008), "requires conduct amounting to an assault." Pet. App. 6a-7a (brackets in original).

The court of appeals acknowledged that other courts of appeals had disagreed about whether every violation of the pre-2008 version of Section 111 required that a defendant have engaged in some form of assault. Pet. App. 8a. The Ninth Circuit, the court noted, had held that the earlier version of Section 111 required proof of "some form of assault" in order to sustain a conviction. *Id.* at 9a (citing *United States* v. *Chapman*, 528 F.3d 1215, 1219 (9th Cir. 2008)). In contrast, the Sixth Circuit had rejected the Ninth Circuit's reasoning in *Chapman*, concluding that the Ninth Circuit's reading "ma[de] a great deal of what § 111 does say entirely meaningless" and therefore violated the canon against construing a statute in a way that renders words superfluous. *United States* v. *Gagnon*, 553 F.3d 1021, 1026 (6th Cir.) (citing *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992)), cert. denied, 130 S. Ct. 115

(2009). The Sixth Circuit in *Gagnon* emphasized that Congress listed five prohibited actions in addition to assault (resisting, opposing, impeding, intimidating, and interfering with an officer) in the text of Section 111(a)(1), and one prohibited action in addition to assault (interfering with an officer) in Section 111(a)(2). *Ibid.* That court concluded that, when Congress added the phrase "simple assault" to the penalty provision in Section 111, it intended it as "a term of art that includes the forcible performance of any of the six proscribed actions in § 111(a) *without* the intent to cause physical contact or to commit a serious felony." *Id.* at 1027.

The court of appeals here held that, "[e]ven before the [2008] change in the statute, the Sixth Circuit rule was the better one, as it avoided rendering superfluous the other five forms of conduct proscribed by § 111(a)(1)." Pet. App. 11a. The court also concluded that the Sixth Circuit's interpretation of Section 111 was "more consonant with the dual purpose of the statute, which * * * is not simply to protect federal officers by punishing assault, but also to 'deter interference with federal law enforcement activities' and ensure the integrity of federal operations by punishing obstruction and other forms of resistance." *Ibid.* (quoting *United States* v. *Feola*, 420 U.S. 671, 678 (1975)).

In addition, the court of appeals considered the 2008 amendment to Section 111, which removed the phrase "all other cases" from the penalty provision, and instead "specif[ied] that the line between misdemeanors and felonies is drawn at physical contact or acting with the intent to commit another crime." Pet. App. 11a. The court reasoned that the amended language "also supports the conclusion that § 111(a)(1) prohibits more than

assault, simple or otherwise." *Ibid.* The court explained that Congress "explicitly dr[ew] the misdemeanor/felony line at physical contact, but it declined the opportunity to delete the other forms of conduct proscribed by the statute or to otherwise clarify that § 111(a)(1) convictions require an underlying assault." *Ibid.*

Applying its understanding that Section 111 does not require assaultive conduct, the court found "ample evidence that [petitioner] 'forcibly . . . resist[ed]' federal officers." Pet. App. 12a (brackets in original). The court relied on petitioner's admission that she "swung her arms for the specific purpose of resisting the officers' attempts to handcuff her." *Ibid.*

b. Although the court of appeals affirmed petitioner's convictions, it vacated her sentence and remanded the case to the district court for resentencing. Pet. App. 12a-17a. The court agreed with both petitioner and the United States that the district court had committed obvious error by sentencing petitioner pursuant to the felony provision of Section 111 even though "physical contact with the officers was neither charged in the indictment nor submitted to the jury." *Id.* at 13a. Had petitioner been properly sentenced under Section 111's misdemeanor provision, she would not have been subject to more than 12 months of imprisonment on each count. *Ibid.* Although the court noted that the district court could have sentenced petitioner to 21 months of imprisonment by running the sentence on the two counts of conviction consecutively, the court vacated petitioner's sentence and remanded the case for resentencing, because there was a reasonable probability that petitioner's sentence would have been different absent the error. *Id.* at 13a-15a.

ARGUMENT

Petitioner asks this Court to review whether a defendant may be convicted for a misdemeanor violation of 18 U.S.C. 111(a)(1) when the defendant is not alleged to have engaged in any assaultive conduct. Further review is not warranted, because the court of appeals' decision is interlocutory and because petitioner's claim lacks merit. In addition, although there was a division among the courts of appeals as to the proper interpretation of Section 111 as it existed before 2008, Section 111 was amended in 2008, and the decision below is the only court of appeals decision to construe the amended statute. There is no warrant for this Court to grant review to resolve a disagreement about a now-superseded statute. In any case, petitioner would not be entitled to relief even under her view of Section 111.

1. Review by this Court of the court of appeals' decision affirming petitioner's convictions and remanding for resentencing is not warranted at this time. That decision is interlocutory because petitioner has not yet been resentenced, and that interlocutory posture "alone furnishe[s] sufficient ground for the denial" of the petition for a writ of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967); *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.") (Scalia, J., concurring in denial of a writ of certiorari); Eugene Gressman et al., *Supreme Court Practice* § 4.18, at 280-281 & n.63 (9th ed. 2007). After the district court resentences petitioner, petitioner will be able to raise her cur-

rent claim—together with any other claims that may arise with respect to her resentencing—in a single petition for a writ of certiorari. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (stating that this Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment).

2. Even if the court of appeals' decision were not interlocutory, review would be unwarranted because the decision is correct. Several factors support the court of appeals' interpretation of Section 111(a)(1) as encompassing violations that do not involve assault. Section 111(a)(1) identifies six categories of prohibited conduct, only one of which is "assault." The other five prohibited actions involve types of behavior that are not necessarily assaultive—*i.e.*, when the defendant forcibly "resists, opposes, impedes, intimidates, or interferes with" a federal officer. 18 U.S.C. 111(a)(1). The commas between the verbs and the disjunctive "or" make clear that Congress intended each category of prohibited conduct to be separate and independent of the others. See *Horne* v. *Flores*, 129 S. Ct. 2579, 2597 (2009). And the last five types of conduct need not be sub-categories of assault. Whereas the term "assault" implies conduct that a suspect initiates against an officer, the other five terms encompass actions taken by the suspect in response to conduct initiated by the officer—actions that may or may not rise to the level of an assault.[1]

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[1] Petitioner's argument (Pet. 14-15) that the court of appeals' reading of Section 111 is inconsistent with courts' interpretation of 18 U.S.C. 113, which prohibits various forms of "assault," is incorrect. As petitioner notes (Pet. 14), Section 113 prohibits seven forms of conduct, one

In addition, one of the statutory predecessors to Section 111 made it an offense to "forcibly resist, oppose, impede, intimidate, or interfere with any [designated official] * * * while engaged in the performance of his official duties, or [to] assault him on account of the performance of his official duties." Act of May 18, 1934, ch. 299, § 2, 48 Stat. 781 (18 U.S.C. 254 (1940)). As this Court recognized, that statute was chiefly directed at non-assault crimes and clearly "outlawed more than assaults." *United States* v. *Feola*, 420 U.S. 671, 682 n.17 (1975); see *Ladner* v. *United States*, 358 U.S. 169, 176 (1958) (stating that former statute "makes it unlawful not only to assault federal officers engaged on official duty but also forcibly to resist, oppose, impede, intimidate or interfere with such officers. Clearly one may resist, oppose, or impede the officers or interfere with the performance of their duties without placing them in personal danger."). As an example of non-assaultive conduct "denounced by the statute," this Court's opinion in *Ladner* mentioned locking a door to a house to prevent officers from arresting a person inside. *Ibid.* And Congress made only a technical change when, as part of the codification of Title 18 in 1948, it placed the word "assault" at the beginning of the statutory text, ahead of the non-assault categories of prohibited conduct. *Id.* at 176 n.4 (discussing Reviser's Notes to Act of June 25, 1948, ch. 645, 62 Stat. 688, which recodified provision as

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of which is described as "simple assault" and the other six of which are described as various forms of "assault"—*e.g.*, "[a]ssault with intent to commit murder" and "[a]ssault with a dangerous weapon." 18 U.S.C. 113; Pet. App. 29a. Because Section 113 does not prohibit any conduct other than assault and simple assault, it is unlike Section 111, which prohibits assault *and* five other categories of conduct.

Section 111, and stating that "th[e] change in wording was not intended to be a substantive one"). Not surprisingly, courts have upheld convictions under Section 111(a)(1) for non-assaultive conduct. See, *e.g.*, *United States* v. *Johnson*, 462 F.2d 423, 425 (3d Cir. 1972) (upholding conviction under Section 111(a) for "willfully resisting, opposing, impeding and interfering with federal officers," despite jury's acquittal of defendant on charge of "assault" under that statute), cert. denied, 410 U.S. 937 (1973).

When Congress amended the penalty structure of Section 111 in 1994, it introduced the phrase "simple assault" to encompass misdemeanor violations; but Congress gave no indication that it thereby intended to cut back on the substantive reach of the statute. Before 1994, Section 111 punished all offenses by up to three years of imprisonment, except that offenses involving a deadly or dangerous weapon were subject to up to ten years of imprisonment. In 1994, Congress amended Section 111(a) by providing that the penalty for acts constituting "simple assault" would be imprisonment for not more than one year, and that the penalty for "all other cases" (other than those involving a deadly or dangerous weapon) would be imprisonment for up to three years. Congress did not define the term "simple assault." There is no indication, however, that Congress intended the 1994 amendment's creation of a class of Section 111 violations punishable as misdemeanors to narrow the statute's substantive reach by eliminating from the statute's scope all non-assaultive "resist[ing], oppos[ing], imped[ing], intimidat[ing], or interfer[ing] with" a federal officer. The court below therefore properly concluded (as did the Sixth Circuit in *Gagnon*) that Section

111's penalty provision applicable to "simple assault" encompasses all of the conduct listed in Section 111(a). See also *United States* v. *Vallery*, 437 F.3d 626, 633 (7th Cir. 2006) ("We hold the simple assault provision of § 111(a) applies to all violations of § 111(a), not merely to 'assaults.'"); *United States* v. *Yates*, 304 F.3d 818, 822 (8th Cir. 2002) ("We hold that, in the context of § 111, the definition of simple assault is conduct in violation of § 111(a), which does not involve actual physical contact, a dangerous weapon, serious bodily injury, or the intent to commit murder or another serious felony."), cert. denied, 538 U.S. 909 (2003).[2]

3. Nor is there any need for this Court to grant review in order to resolve a conflict among the courts of appeals. Petitioner errs in arguing (Pet. 9-12) that the court of appeals' decision squarely conflicts with the Ninth Circuit's holding in *United States* v. *Chapman*, 528 F.3d 1215 (2008), or with the decision of any other court of appeals. Congress recently amended Section 111, and the only courts to have considered whether the current version of the statute prohibits non-assaultive

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[2] Petitioner argues (Pet. 18) that "interpreting 'simple assault' to require proof of an assault would not make [the] five forms of non-assaultive conduct [listed in subsection (a)(1)] superfluous for *all* aspects of § 111." She argues that "the non-assaultive conduct listed in 111(a) would inform * * * the 'any acts' portion of the felony offense established in § 111(b)," which penalizes as a felony the commission of any acts described in subsection (a) if a deadly or dangerous weapon is used or bodily injury occurs. But this argument ignores the fact that the non-assaultive conduct listed in Section 111(a), if committed through the use of a deadly or dangerous weapon, or if it results in bodily injury, would amount to an assault. Thus, unless Congress intended those five forms of conduct to encompass non-assaultive acts, it would not have needed to itemize them in Subsection (a).

conduct (*i.e.*, the court of appeals in this case and one district court) have agreed that it does. Pet. App. 5a-12a; *United States* v. *Perea*, No. CR 09-1034 JB, 2010 WL 2292937 (D.N.M. May 21, 2010).

a. In *Chapman*, the Ninth Circuit construed the pre-2008 version of Section 111, which punished "simple assaults" as misdemeanors and "all other cases" as felonies. In determining whether that version of the statute prohibited conduct that did not constitute assault, the court identified "two major ambiguities" in the statute: "First, [the statute] distinguishe[d] between misdemeanor and felony conduct by use of the term 'simple assault'" but did not define that term. 528 F.3d at 1218. Second, the statute "appears to prohibit six different types of actions, only one of which is 'assault,' but then it draws the line between misdemeanors and felonies solely by referencing the crime of assault." *Id.* at 1218-1219. In the view of the Ninth Circuit, construing Section 111 to prohibit non-assaultive conduct would require such conduct to be treated as a felony violation of the statute because the version of the statute before that court distinguished between "simple assaults" and "all other cases." *Id.* at 1220. Such a reading of the statute, the Ninth Circuit stated, "ineluctably leads to absurdity."[3] *Ibid.* Thus, the court concluded that the stat

[3] The Ninth Circuit's reading of Section 111 ignores the plain text of the statute's substantive prohibition. In concluding that a violation of Section 111 requires proof of an assault, the *Chapman* court reasoned that, if it accepted the argument that mere passive resistence was sufficient to support conviction under Section 111(a), the court would be forced to accept the absurd result that "[a] protester who resisted arrest by merely standing still would be guilty of a felony punishable by up to eight years imprisonment, whereas an individual who attempted to punch an arresting officer could be guilty only of a misdemeanor, so

ute's reference to acts that constitute "only simple assault" as the benchmark for the misdemeanor offense required that the statute be interpreted to "require at least some form of assault." *Id.* at 1221.[4]

Although the Ninth Circuit's construction of Section 111 in *Chapman* did conflict with the subsequent decision of the Sixth Circuit in *United States* v. *Gagnon*, 553 F.3d 1021 (2009), there is no reason for this Court to resolve that conflict because Section 111 was amended in 2008, after the conduct charged in both *Chapman* and *Gagnon*. Court Security Improvement Act of 2007 § 208(b), 121 Stat. 2538. No similar conflict has developed with respect to the amended version of the statute.

The Court Security Improvement Act amended Section 111 by striking the phrase "in all other cases" and inserting "where such acts involve physical contact with the victim of that assault or the intent to commit another felony." Pub. L. No. 110-177, § 208(b), 121 Stat. 2538. By striking the phrase "in all other cases," the 2008 amendment alleviated some of the "ambiguit[y]" the

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long as the attempted physical contact was unsuccessful." 528 F.3d at 1220. As the court of appeals in the instant case properly concluded (Pet. App. 10a), the Ninth Circuit's reasoning (on which petitioner also relies, see Pet. 16), ignores the requirement in Section 111 that any resistance, opposition, impeding, intimidation, or interference with a federal officer be forcible.

[4] In so concluding, the *Chapman* court failed to cite its earlier decision in *United States* v. *Jim*, 865 F.2d 211 (9th Cir.), cert. denied, 493 U.S. 827 (1989), in which it found both that "Section 111 prohibits in addition to assault, resisting, impeding, intimidating, and interfering with a federal officer," and that, in originally enacting Section 111, "Congress intended to prevent interference with federal functions, not just assault on federal officers." *Id.* at 214, see *Ibid.* ("We conclude that § 111 has a broader purpose than to deter assault.").

Ninth Circuit in *Chapman* found in the previous version of Section 111. The only courts to have addressed whether a conviction under the current version of Section 111 requires proof of an underlying assault—the Fifth Circuit in this case and a district court in New Mexico in *Perea*, No. CR 09-1034 JB, 2010 WL 2292937—have concluded that it does not, and that a conviction based on the other acts listed in Section 111(a) does not require proof of an underlying assault. The Ninth Circuit has not had an opportunity to reconsider its interpretation of the statute since the recent amendment. It is true, as petitioner observes (Pet. 11), that the 2008 amendments to the statute did not explicitly resolve the issue presented here (see *Gagnon*, 553 F.3d at 1024 n.2), and it is therefore possible that a similar conflict could develop with respect to the construction of Section 111(a) as amended. But this Court should wait to see whether such a conflict does arise and, if so, to resolve the issue in a case involving the amended statutory language.

b. In addition, petitioner is incorrect in suggesting (Pet. 10-12) that the decision below conflicts with decisions of courts of appeals other than the Ninth Circuit. Other than *Chapman*, none of the decisions on which petitioner relies considered the question presented in this case, and none held that Section 111 prohibits only conduct that constitutes assault. Rather, those cases held that, in order to convict a defendant of a felony violation of the pre-2008 version of Section 111, the government had to allege in the indictment and prove at trial that the defendant engaged in assaultive conduct that involved physical contact or otherwise exceeded the bounds of the common-law understanding of simple as-

sault. See *Vallery*, 437 F.3d at 629-633 (7th Cir.); *United States* v. *Hathaway*, 318 F.3d 1001, 1006-1009 (10th Cir. 2003); *Yates*, 304 F.3d at 822-823 (8th Cir.); *United States* v. *McCulligan*, 256 F.3d 97, 101-104 (3d Cir. 2001); *United States* v. *Ramirez*, 233 F.3d 318, 320-323 (5th Cir. 2000); *United States* v. *Chestaro*, 197 F.3d 600, 604-605 (2d Cir. 1999), cert. denied, 530 U.S. 1245 (2000). In each of those cases, it was alleged that the defendant's offense conduct had included physical contact with a federal officer, had resulted in physical injury, or had involved the use or attempted use of a deadly or dangerous weapon. See *Vallery*, 437 F.3d at 628-629 (officer received minor injuries; defendant pushed officer); *Hathaway*, 318 F.3d at 1003-1004 (officer suffered bruising; defendant pushed officer in the chest and choked him with his tie); *Yates*, 304 F.3d at 820-821 (defendant attempted to drive his truck into officers' car; truck was "dangerous weapon"); *Ramirez*, 233 F.3d at 320 (defendant hurled two cups of human waste at officer, striking officer in the chest); *Chestaro*, 197 F.3d at 602-603 (officers received minor injuries; defendant swung box-cutter at officers); see also *McCulligan*, 256 F.3d at 98-99, 104 (although defendant drove his car into officers' car, court of appeals held that proof of "actual contact" was required under Section 111(a); defendant was not charged under Section 111(b), which provides an enhanced penalty for the use of a deadly or dangerous weapon).

None of those cases is inconsistent with the holding of the court of appeals in this case. On the contrary, the courts have agreed that Section 111 creates three separate offenses, one of which is a misdemeanor ("simple assault") and two of which are felonies. The focus of the

decisions of other courts of appeals (other than the Ninth Circuit in *Chapman*) has been on whether a particular defendant was properly charged with a misdemeanor or a felony violation of Section 111, not on whether conduct that does not constitute an assault in any form is covered by the statute. See Pet. App. 7a-8a (noting that, although the Fifth Circuit has interpreted Section 111 to create three separate offenses, "this court has never ruled on whether the additional conduct proscribed in § 111(a)(1) requires, at a minimum, underlying assaultive conduct").

4. Finally, further review by this Court is also unwarranted because there is no reason to believe that petitioner would prevail under the construction of Section 111(a) urged by petitioner and adopted by the Ninth Circuit in *Chapman*. Although that construction would require the government to establish that petitioner committed an assault, petitioner's conduct in this case did constitute an assault. In adopting the common law definition of assault, the *Chapman* court held that, "[t]o constitute an assault, an action must be either a willful attempt to inflict injury upon the person of another, or . . . a threat to inflict injury upon the person of another which, when coupled with an apparent present ability, causes a reasonable apprehension of immediate bodily harm." 528 F.3d at 1219-1220 (citation and internal quotation marks omitted). Petitioner resisted the officers' attempts to handcuff her by wildly flailing her arms while holding a lit cigarette, and refusing the officers' commands to put out the cigarette. Such conduct amounted to a "threat to inflict injury" upon the officers if they persisted in their attempts to handcuff her, and would cause a reasonable apprehension of immediate

bodily harm on the part of the officers. See *McCulligan*, 256 F.3d at 102-104 & n.3 (defining simple assault as the "attempt or offer to beat another, without touching him," or the "placing of another in reasonable apprehension of a battery") (citing 3 William Blackstone, *Commentaries on the Laws of England* 120 (1768) and *Ramirez*, 233 F.3d at 321-322); *United States* v. *Bayes*, 210 F.3d 64, 68 (1st Cir. 2000) (finding that assault at common law had two meanings: "an attempt to commit a battery" and "an act putting another in reasonable apprehension of bodily harm") (quoting *United States* v. *Bell*, 505 F.2d 539, 540 (7th Cir. 1974), cert. denied, 420 U.S. 964 (1975)); cf. *United States* v. *Peneaux*, 432 F.3d 882, 890 (8th Cir. 2005) (holding that a lit cigarette can be a dangerous weapon for purpose of 18 U.S.C. 113(a)(3), which prohibits assault), cert. denied, 549 U.S. 828 (2006).

Moreover, petitioner's deliberate struggles to break free from the officers as they attempted to handcuff her constituted a completed battery, which would also have qualified as an assault under the statute. *United States* v. *Lewellyn*, 481 F.3d 695, 697 (9th Cir.) (under common law, "proof of a battery will support conviction of an assault") (quoting *United States* v. *Dupree*, 544 F.2d 1050, 1052 (9th Cir. 1976)), cert. denied, 552 U.S. 864 (2007); *United States* v. *Linn*, 438 F.2d 456, 459 (10th Cir. 1971) ("[W]hen the evidence shows there has been a battery of the federal officers, this is sufficient to sustain a conviction under § 111."); cf. *United States* v. *Delis*, 558 F.3d 177, 181 (2d Cir. 2009) (holding that "completed common-law battery" falls within the definition of the term "simple assault" as used in 18 U.S.C. 113(a)(5))

That petitioner may not have intended to cause injury to the officers is irrelevant, because, as the courts of appeals—including the Ninth Circuit—have repeatedly held, Section 111 is a general intent crime that requires no proof of intent to injure. See, *e.g.*, *United States* v. *Garcia-Camacho*, 122 F.3d 1265, 1268 (9th Cir. 1997). Even if petitioner did not intend to strike and injure the officers during her struggle to break free, she would be guilty of violating Section 111 if she intentionally resisted the officers' lawful attempts to handcuff her. See *Delis*, 558 F.3d at 184 ("As common-law battery did not require specific intent to injure, * * * conviction under § 113(a)(5) for conduct constituting common-law battery does not require any finding of specific intent to injure."); *Lewellyn*, 481 F.3d at 697 ("The *mens rea* requirement [for assault] is that the volitional act be willful or intentional; an intent to cause injury is not required.") (citing *United States* v. *Skeet*, 665 F.2d 983, 986-987 (9th Cir. 1982)). Thus, petitioner would not be entitled to relief even under her view of Section 111.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 10-212

IN THE
Supreme Court of the United States

MARIA HENRIETTA WILLIAMS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OF PETITIONER

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INTRODUCTION

The Brief in Opposition only serves to confirm that certiorari is warranted in this case. The petition presents a straightforward legal issue that has divided the circuit courts: whether a defendant may be convicted of "simple assault" under 18 U.S.C. § 111(a) if the Government neither pleads nor proves the elements of common-law assault. The Fifth Circuit's decision below and more recent federal cases acknowledge the circuit split, which has implications for federal law that extend well beyond the immediate question of whether the conviction of Petitioner Maria Williams must be vacated.

Against the backdrop of this acknowledged circuit split, the Government's lead argument for denying certiorari is that Mrs. Williams's petition is interlocutory. Opp. at 9–10. But the Court routinely grants review in circumstances like these, where the reversal of the petitioner's criminal conviction would obviate the need for resentencing in the district court. In fact, when Mrs. Williams requested a resentencing continuance on the ground that her husband is not expected to return from his military deployment in Iraq until December 2010, the district court continued the resentencing in this case until after the Court has considered this petition and, if granted, "until the circuit split has been resolved." Order, *United States v. Williams*, No. 08-CR-1832 [Dkt. 82] (W.D. Tex. June 17, 2010). Simply put, there is no good reason for the Court to defer its consideration of Mrs. Williams's petition—or its resolution of the circuit split that it presents.

In an attempt to obscure and downplay the circuit split, the Government tries to give the

impression that the 2008 amendments to § 111(a) resolved the conflict among the circuits. Those amendments, however, addressed a different ambiguity in the statute, without resolving the circuit split over whether a conviction for "simple assault" requires proof of assault. Notably, no federal court to have considered the question with the benefit of the 2008 amendments deemed them to be an answer, and even the Government in its opposition brief had to concede that "the 2008 amendments to the statute did not explicitly resolve the issue presented here." Opp. at 16. Thus, it remains for this Court to resolve the circuit courts' disagreement over the question presented, and Mrs. Williams's case offers an ideal vehicle for doing so.

REASONS FOR GRANTING THE WRIT

I. The Government Offers No Good Reason For The Court To Defer Consideration Of The Petition Or To Delay Resolution Of The Circuit Split This Case Presents.

The Government's lead argument in opposition is that review is premature. Because the Fifth Circuit's decision remanded for resentencing at the same time that it affirmed Mrs. Williams's conviction under § 111(a), the Government contends that "review is not warranted" at this time. Opp. 9.

The Government's argument lacks merit. This Court routinely finds criminal cases appropriate for review where, as here, the circuit court has affirmed the petitioner's conviction but remanded for resentencing. *See, e.g.*, *Skilling v. United States*, 558 U.S. ---, 130 S. Ct. 393 (2009); *Begay v. United States*, 551 U.S. 1191 (2007); *Zedner v. United States*, 546 U.S. 1085 (2006). This approach is consistent with

the well-settled principle that, where "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status." ROBERT J. STERN, ET AL., SUPREME COURT PRACTICE § 4.18, at 259 (8th ed. 2002).

In this case, Mrs. Williams raises a clear-cut legal issue that is fundamental to her conviction and that has divided the circuit courts. It serves no conceivable interest to force Mrs. Williams to wait until after remand, resentencing, and the resolution of further appeals (if any) before reprising her petition for certiorari. Tellingly, the Government does not even try to explain how deferring review might benefit this Court or the courts below.

Furthermore, Mrs. Williams's petition presents a particularly compelling case for this Court to review now, without waiting for the conclusion of further proceedings on remand. After the Fifth Circuit affirmed her convictions, Mrs. Williams moved the district court for a continuance of her resentencing, noting that: (1) her husband is not expected to return from his current tour of duty with the U.S. Army in Iraq until December 2010; and (2) Mrs. Williams is currently the sole caretaker of her minor son and a minor granddaughter. *See* Mot. to Continue Re-Sentencing, *Williams*, 08-CR-01832 [Dkt. 81] (W.D. Tex. June 16, 2010). The court granted the motion and continued Mrs. Williams's resentencing "until after her petition for certiorari is ruled upon, and if her appeal is accepted by the United States Supreme Court, until the circuit split

has been resolved." Order, *Williams*, No. 08-CR-1832 [Dkt. 82] (W.D. Tex. June 17, 2010).

At bottom, there is no valid reason for denying certiorari on the ground that the petition is interlocutory. Mrs. Williams's petition offers a good vehicle for resolving an acknowledged circuit split on an important question of federal law. A remand will neither impact that legal question nor assist the Court in any later consideration of this case. But if the Court resolves the circuit split by adopting Mrs. Williams's interpretation of § 111(a), then resentencing will be unnecessary. In this situation, as the district court recognized, it makes no sense to require Mrs. Williams to undergo resentencing before this Court has considered her petition.

II. The Government Cannot Dispute That The Courts Of Appeals Are Divided With Respect To The Question Presented.

Despite its efforts, the Government cannot obscure the clear and unmistakable split among the circuits over the meaning of "simple assault," as the term appears in § 111(a). In the decision below, the Fifth Circuit noted that "[s]everal circuits have split on this question." App. 8a. The Fifth Circuit expressly acknowledged the conflict between its holding and that of the Ninth Circuit in *United States v. Chapman*, 528 F.3d 1215 (9th Cir. 2008). App. 11-12a. More recent federal decisions continue to recognize the existence of a circuit split on the issue. *See, e.g.*, *United States v. Perea*, No. CR 09-1034 JB, --- F. Supp. 2d ---, 2010 WL 2292997, at *6–8 (D.N.M. Apr. 23, 2010) (addressing "the Circuit Split Whether § 111(a) Requires Assaultive Conduct").

It bears emphasis that the split among the federal circuits on this issue is even more pronounced than the decision below acknowledges. The Fifth Circuit held that Mrs. Williams committed "simple assault" under § 111(a) even though she had not committed an assault under the common-law meaning of the term. App. 11–12a. The Fifth Circuit's decision thus conflicts with the reasoning of numerous other circuits which hold "that 'simple assault' in § 111 should be defined by reference both to the common-law meaning of assault and to the meaning of 'simple assault' as Congress uses that phrase in § 113." *United States v. Hathaway*, 318 F.3d 1001, 1008 (10th Cir. 2003).[1]

To be sure, these cases hold that the distinction between misdemeanor "simple assault" and a more serious offense under the statute turns on whether there was physical contact or a similar aggravating factor, such as intent to commit a felony. *See, e.g., United States v. Vallery*, 437 F.3d 626, 632 (7th Cir. 2006). But each of these decisions is based upon the principle that the term "simple assault" must carry its common-law meaning. That is precisely the principle that the Fifth Circuit rejected in holding that "simple assault" is merely a "term of art" that does not necessarily involve the elements of common-law simple assault. App. 10a.

Against the background of this acknowledged circuit split, the Government erroneously contends that the 2008 amendments to § 111(a) provide a

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[1] *See also United States v. Vallery*, 437 F.3d 626, 631 (7th Cir. 2006); *United States v. Yates*, 304 F.3d 818, 822 (8th Cir. 2002); *United States v. McCulligan*, 256 F.3d 97, 104 (3d Cir. 2001); *United States v. Chestaro*, 197 F.3d 600, 605 (2d Cir. 1999).

valid basis for denying review. Opp. 15–16. Those amendments, however, are simply not relevant to the circuit split at issue here regarding the meaning of "simple assault." The 2008 amendments resolved a different ambiguity in the earlier version of § 111(a): they clarified which types of felony assaults carry a maximum eight-year penalty under the statute, without addressing the "simple assault" provision of § 111(a) that divided the circuits in this case. *See* Court Security Improvement Act of 2007, Pub. L. No. 110-177, § 208(b), 121 Stat. 2534, 2538 (2008); *see also* Pet. 11–12.

The Government's own Brief in Opposition further confirms that the 2008 amendments have not resolved the conflict among the circuit courts. Although the Government initially characterizes the question presented as "a disagreement about a now-superseded statute," Opp. 9, it later concedes "that the 2008 amendments to the statute did not explicitly resolve the issue presented here," *id.* at 16. This concession was necessary because the courts that have recently disagreed about the interpretation of "simple assault" in § 111(a) were aware of the 2008 amendments but did not conclude that the amendments resolved the circuit split. *See, e.g.*, *United States v. Gagnon*, 553 F.3d 1021, 1024 n.2 (6th Cir. 2009) ("[T]he amendments do not directly resolve the ambiguity at issue here."); *id.* at 1025 n.4 ("Congress's amendment does little to clarify the primary question in this appeal: whether § 111 is limited only to assaults or includes all the actions spelled out in § 111(a).").

The Government's concession underscores that there is no reason to "wait to see" if the circuit split

will recur in another case involving the amended statute. Opp. 16. The 2008 amendments to § 111(a) did not resolve the ambiguity that gave rise to the split. The conflict among the circuits persists, and this Court's intervention is necessary to resolve it.

III. The Decision Below Disregards The Plain Language Of § 111(a) And Well-Settled Principles Of Statutory Interpretation.

Because the Government cannot plausibly dispute the circuit split presented by Mrs. Williams's petition, it spends several pages of its opposition brief arguing the merits of the case. *See* Opp. 10–13, 18–20. The Government's attention to the merits only serves to underscore that the Court should grant the petition for certiorari and set this case for plenary review. Moreover, the Government's merits arguments confirm that the Fifth Circuit's interpretation of § 111(a) is fundamentally flawed.

The error in the Fifth Circuit's interpretation of § 111(a) is the disconnection of the term "simple assault" from its well-established, common-law meaning. When Congress uses a specific, common-law term in the text of a statute, the courts should infer that Congress meant to incorporate the established common-law meaning of the term. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992); *see also Morrisette v. United States*, 342 U.S. 246, 263 (1952) ("In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.").

The Government can hardly dispute that "simple assault" is a common-law term with a well-established meaning. *See Vallery*, 437 F.3d at 631

("There is no dispute that 'simple assault' is a crime 'committed by either a willful attempt to inflict injury upon the person of another, or by a threat to inflict injury upon the person of another which, when coupled with an apparent present ability, causes a reasonable apprehension of immediate bodily harm.'"). But the Government barely even addresses the common-law meaning of "simple assault" in its opposition brief, let alone offers any legitimate justification for depriving the term of its common-law meaning for purposes of § 111(a).

Indeed, the federal courts broadly agree that the term "simple assault" in § 113(a) of Title 18 carries the common-law meaning. *E.g.*, *United States v. Bayes*, 210 F.3d 64, 68 (1st Cir. 2000); *see also* Pet. 15 (citing cases). The Government tries to distinguish "simple assault" in § 111(a) from "simple assault" in § 113(a) on the ground that the former "prohibits assault *and* five other categories of conduct," Opp. at 10–11, n.1 (emphasis in original), but that argument simply begs the question of whether § 111(a), as amended in 1994, criminalizes conduct other than assault. After all, there is no reason to presume that Congress intended to give the same common-law term dramatically different meanings within different sections of the same chapter of Title 18. That is why federal courts have routinely held that "'simple assault' in § 111 should be defined by reference both to the common-law meaning of assault and to the meaning of 'simple assault' as Congress used that phrase in § 113." *E.g.*, *Hathaway*, 318 F.3d at 1008. The Government's brief has no good answer for this precedent, which illustrates the problems with the Fifth Circuit's decision and underscores the need for this Court to

resolve the disagreement among the circuits over the interpretation of § 111(a).

The Government's alternative argument that the "conduct in this case did constitute an assault" need not detain the Court at all. *See* Opp. at 18. Although the Government cites extensively from its own self-serving version of events proffered in the courts below, the account adopted by the Fifth Circuit is more pertinent to resolution of the legal question addressed in its decision. The Fifth Circuit conspicuously did not find that Mrs. Williams had committed an assault; instead, it asked whether "a defendant [can] be convicted of forcible resistance under th[e] statute without having committed an underlying assault?" App. 7a. This is because Mrs. Williams was not convicted by the jury of having committed an assault. On the contrary, the evidence before the district court was that Mrs. Williams "wasn't . . . trying to fight" with the military police who were taking her into custody. App. 3a.

In light of the Fifth Circuit's decision and the evidence before the district court, it strains the definition of "assault" for the Government now to contend that Mrs. Williams's struggles with the military police constituted "simple assault" within the meaning of the statute. The Government's argument would fail even in the context of plenary review. It is especially misplaced now and provides no valid basis for denying the petition for certiorari.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari and either summarily reverse the judgment below or set the case for plenary review.

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